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No. 684

In the

Supreme Court of the United States

OCTOBER TERM, 1959

HELEN MARY ROBINSON, ADMINISTRATRIX,
Petitioner,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO [redacted] AND THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS AT FORT WORTH, [redacted].

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No.

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HELEN MARY ROBINSON, ADMINISTRATRIX,
Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS AT FORT WORTH, JOINTLY OR IN THE ALTERNATIVE.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, HELEN MARY ROBINSON, ADMINISTRATRIX, prays that a Writ of Certiorari issue to review jointly and in the alternative the Judgment of the Court of Civil Appeals for the Second Supreme Judicial District

of Texas at Fort Worth entered in the above entitled cause on May 15, 1959 (Petitioner's Motion for Rehearing in said cause having been denied by said Court of Civil Appeals on June 26, 1959), and the Order of the Supreme Court of the State of Texas entered in the above entitled and numbered cause on October 7, 1959, refusing Petitioner's Application for Writ of Error (Petitioner's Motion for Rehearing of such Application for Writ of Error in said cause having been denied on November 11, 1959).

I. REPORT OF THE OPINION OF THE COURT BELOW

The Opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth (R. IV), printed in Appendix A hereto, infra., Page 21, is reported in 325 S. W. 2d 432. The Order of the Court of Civil Appeals denying the Motion for Rehearing (R. V), printed in Appendix B hereto, infra., Page 31, is not reported. The Order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error (R. IX), printed in Appendix B hereto, infra., Page 33, is not reported. The Order of the Supreme Court of Texas overruling Petitioner's Motion for Rehearing of her Application for Writ of Error (R. IX), printed in Appendix B hereto, infra., Page 35, is not reported.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The final judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort

Worth was rendered and entered on May 15, 1959, Appendix B hereto, infra., Page 29 (R. V). The Order overruling Petitioner's Motion for Rehearing by said Court of Civil Appeals was rendered and entered on June 26, 1959, Appendix B hereto, infra., Page 31 (R. V).

2. The Order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error was rendered on October 7, 1959, Appendix B hereto, infra., Page 33 (R. IX). The Order overruling Petitioner's Motion for a Rehearing of her Application for Writ of Error was rendered and entered on November 11, 1959, by the Supreme Court of Texas, Appendix B hereto, infra., Page 35 (R. IX).

3. The jurisdiction of this Court is invoked under *28 U. S. C., Section 1254(3)*, since a right and privilege is specially set up and claimed under the Constitution and Statutes of and under authority exercised under the United States and under *45 U. S. C., Section 51, et seq.*

III. QUESTIONS PRESENTED

1. Whether the failure of a railway company to furnish its injured employee a reasonably safe place in which to work is a question which should be submitted to the jury in an action brought in a state court under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.?*

2. Whether a state court, in an action brought under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, deprives the injured employee of his right of

trial by jury by refusing to submit to the jury the issue of the failure of the employer to furnish the employee with a reasonably safe place in which to work, where such issue is raised by the evidence?

3. Whether under the *Federal Employer's Liability Act* the jury has a greater power to draw inferences than under the common law?

IV. STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, and more specifically involved in this petition is that portion of *45 U. S. C., Section 51*, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in

such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

V. STATEMENT

1. Material Facts:

Petitioner, Helen Mary Robinson, brought this suit against Respondent, Gulf, Colorado and Santa Fe Railway Company, under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, to recover for damages for the death of her husband while in the regular course and scope of his employment with Respondent.

The deceased was killed when the train on which he was working as fireman collided with a county asphalt truck at the point in Tarrant County, Texas, where defendant's track is crossed by Avondale School Road.

In her petition in the trial court, Petitioner alleged that Respondent was negligent in failing to furnish her deceased husband with a reasonably safe place in which to work as an employee of Respondent and further alleged that the Railway Company was negligent in other particular respects.

The evidence and the reasonable inferences to be drawn therefrom showed that the Avondale Crossing would have first come into the engineer's view approximately one and one-half (1½) miles from the Crossing; that the train approached the Crossing at a speed of approximately eighty-four (84) miles per hour; that one crossing the Crossing going west, as was the asphalt truck driver, would view the train head-on in an attitude almost impossible to judge or estimate its speed of approach with any degree of certainty whatever; that the opportunity to observe the speed of the train would be limited at most to seconds; that after rounding the curve a mile and a half away that within approximately sixty (60) seconds the train would, at the speed at which it was travelling, be moving across the Avondale Crossing; that under the circumstances created by Respondent that one using the Crossing would have to be most attentive and alert in order to safely use the Crossing; that the whistle on the train was inadequate to warn of its approach as it was not heard by the passenger on the asphalt truck but that if the train whistle were heard that one would have no more than ten (10) seconds to get across the Crossing; that the Crossing was marked only by a simple, old-fashioned, cross-buck railroad sign reading "Railroad Crossing"; that there was no flashing or other signal existent to give visual or other warning to those at the Crossing of the approach of any train nor was there an arm gate device; that a collision at the Crossing could derail the locomotive and otherwise endanger the lives of the engineer and fireman working thereon; that the engineer was a man almost seventy-four

(74) years of age and was not physically or mentally capable of safely operating Respondent's train under the conditions existent at the Crossing and the speed of the train; that Respondent did not warn the persons in charge of its train that the Avondale Crossing was dangerous at the time and place in question in view of the road repair works going on around such crossing; that all the means at hand were not used to stop or slow the train immediately prior to the collision in question; and that Respondent knew or should have known of the existence of all of such facts, circumstances, and conditions.

The evidence further showed that, regardless of the causation of the collision itself, that Respondent failed to furnish deceased a safe place to work in that there was no interior damage to the cab except by fire; that there would have been no injury or resulting death to the deceased had it not been for the fire inside the cab; that the door of the cab had been tied back; that a door of the cab would not close; that a window of the cab was open and that if the doors and windows of the cab had been closed at the time of the collision, which cab was under the control of defendant's engineer and defendant's conductor, that the fire probably would not have occurred in the cab and that the deceased would still be alive today.

The Trial Court submitted to the jury special issues concerning specific acts of negligence of the Railway Company which issues were answered favorable to the Railway Company. The jury further found in answer to a special issue submitted that the accident as between the deceased,

and Respondent was the result of an unavoidable accident and further found that the sole proximate cause of the accident were actions on the part of the driver of the asphalt truck.

However, the Trial Court failed to submit to the Jury issues concerning whether or not Respondent failed to furnish the deceased with a reasonably safe place in which to do his work, which issue was raised by the evidence as a whole, and in particular, was raised by evidence not embraced within the specific negligence issues submitted. Specifically not covered by the negligence issues submitted to the jury were issues concerning the condition of the cab itself; the sufficiency of the train's whistle; the use of all the means at hand to stop the train; the fitness of the engineer; and the sufficiency of warning of danger.

Based upon the jury's verdict the Trial Court rendered a judgment for Respondent that Petitioner take nothing, from which judgment Petitioner duly perfected her appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth.

Upon appeal, the Court of Civil Appeals disregarded the evidence showing that the issue should have been submitted inquiring as to the failure of Respondent to furnish deceased with a safe place in which to do his work and affirmed the judgment of the Trial Court. The Texas Supreme Court refused to grant Petitioner's Application for Writ of Error.

2. How Federal Question Was Presented in the State Courts.

The Constitutional and Federal questions forming the basis of this petition to this Honorable Court were urged upon the State Courts as follows:

A. *Trial Court.*

Petitioner first raised a Federal question in her Original Petition, which Federal question was carried through in her First Amended Original Petition, each of which Petitions alleged in Paragraph I:

> That Petitioner brought this action "under the Federal Employer's Liability Act, Sections 51, et seq., Title 45, U. S. Code, Annotated * * *."

In Paragraph V of such Petitions it was alleged as follows:

> "At the time of the collision described in the preceding paragraph, Grady Farris Robinson, as the agent, servant and employee of the Gulf, Colorado and Santa Fe Railway Company was then and there a member of the train crew of the defendant company which was hauling passengers in interstate commerce on the main line of said railway company, which main line extended from Texas into the States of Oklahoma, Kansas, Missouri, Illinois and other states, so that the duties of Grady Farris Robinson were at such time described above the furtherance of interstate commerce by reason of which the said Employer's Liability Act governs the cause of action here asserted against Gulf, Colorado and Santa Fe Railway Company."

After the completion of the evidence, Petitioner requested that the Trial Court submit issues on the failure of Respondent to provide Grady Farris Robinson with a safe

place to work, which the Trial Court refused (R. I-60). The Court's error in refusing the submission of such issues was preserved for appeal by Petitioner assigning in her Motion for New Trial that the Trial Court erred in refusing to submit such issues. (R. I-83.) Petitioner further stated in her Motion for New Trial as follows:

> "The Charge of the Court as presented to the jury withdrew from consideration of the jury the prime, principal and controlling issues as to the negligence of defendant, and denied plaintiff a trial by jury on the whole of the cause of action brought by her under the Federal Employer's Liability Act, presented in her pleadings and established by the evidence and proof in the case, in that the Court resolved against plaintiff as a matter of law all such prime, principal and controlling issues, particularly on the question of the failure of the defendant to provide a reasonably safe place for the decedent to work, and its failure to install at the crossing some character of warning device to protect the train and its crew." (R. 82-83.)

B. *The Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth.*

The Federal question was next presented by Petitioner's Brief (R. III) as submitted to the Court of Civil Appeals for the Second Supreme Judicial District in which Petitioner's First Point of Error was with reference to the Trial Court's refusing to submit Petitioner's Requested Issues on defendant's failure to provide Grady Farris Robinson with a safe place to work. This Point of Error was duly carried along in Petitioner's Motion for Rehearing (R. VI) and Amended Motion for Rehearing (R. VII) each of which also assigned as error the Court's refusal to submit such

issues, being the controlling issues in a Federal Employer's Liability Act case.

The Court of Civil Appeals affirmed the Trial Court's judgment (R. V) and overruled Petitioner's Motion for Rehearing (R. V).

C. *Supreme Court of Texas.*

After Petitioner's Motion for Rehearing was overruled by the Court of Civil Appeals, Petitioner filed her Application for Writ of Error to the Supreme Court of Texas. In this Application, Petitioner brought forward the Point of Error to the effect that the Trial Court erred in refusing to submit to the jury the requested issues on the employer's failure to provide Grady Farris Robinson with a safe place to work (R. VIII).

The Supreme Court refused Petitioner's Application for Writ of Error (R. IX), and Petitioner filed a Motion for Rehearing (R. X) which again brought to the attention of the Supreme Court the Points brought forward in Petitioner's Application for Writ of Error. The Supreme Court of Texas subsequently overruled Petitioner's Motion for Rehearing of her Application for Writ of Error (R. IX).

VI. REASONS FOR GRANTING THE WRIT

1. The refusal of the Trial Court to submit to the jury issues on the failure of Respondent to furnish the deceased, Grady Farris Robinson, with a safe place to work; the decision of the Court of Civil Appeals affirming the judgment of the Trial Court which was based upon a jury

verdict which did not give the jury the opportunity to pass upon the issue of the failure of Respondent to furnish the deceased with a safe place to work; and the refusal of the Supreme Court of Texas to grant an Application for Writ of Error are not in accord with the applicable decisions of this Court.

The decisions and judgments of the State Courts herein are in direct conflict with the holdings of this Court which hold that it is a question for a jury to determine whether an employer under the Federal Employer's Liability Act is liable for injuries to an employee by virtue of the employer's failing to furnish the employee a reasonably safe place in which to do his work, particularly where the employer knew or should have known of the dangerous condition existing. *K. L. Cahill v. New York, New Haven and Hartford Railroad, 76 S. Ct. 180; Lillie v. Thompson, 332 U. S. 459; Smalls v. Atlantic Coast Line R. Co., 348 U. S. 946;* and *Schulz v. Pennsylvania R. Co., 76 S. Ct. 134 and 608.* Also of major importance in this regard are other recent cases decided by this Court. *Arnold v. Panhandle & SFR Co., 353 U. S. 360, 77 S. Ct. 840; Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443; Webb v. Illinois Central R. Co., 352 U. S. 512, 77 S. Ct. 451; Shaw v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 680; Futrelle v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 682; Deen v. Gulf, C. & S. F. R. Co., 353 U. S. 925, 77 S. Ct. 715; Thompson v. T. & P. R. Co, 353 U S. 926, 77 S. Ct. 698; Ringhiser v. Chesapeake & OR Co., 354 U. S. 901, 77 S. Ct. 1093; McBride v. Toledo Terminal R. Co., 354 U. S. 517, 77 S. Ct. 1398; Gibson v. Thompson, 355*

U. S. 18, 78 S. Ct. 2; Honeycutt v. Wabash R. Co., 355 U. S. 424, 78 S. Ct. 393; Ferguson v. St. Louis San Francisco R. Co., 356 U. S. 41, 78 S. Ct. 671; Moore v. Terminal Railroad Association, 358 U. S. 31, 79 S. Ct. 2; Harris v. Pennsylvania R. Co., 80 S. Ct. 22; Conner v. Butler, 80 S. Ct. 21.

2. The failure of the Trial Court to submit the ultimate issue of the failure of Respondent to furnish deceased a safe place to work and the failure of the Texas Court of Civil Appeals and the Texas Supreme Court to reverse the Trial Court's Judgment constituted an invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution.

Under the law as enunciated by the Supreme Court of Texas, the theories of each party must be directly submitted where raised by the evidence and such right cannot be lost or defeated even though jury findings on other issues in effect indirectly negative a favorable finding on an issue not submitted, but raised by the evidence. *Blanton v. E & L Transport Company, et al., 207 S. W. 2d 368 (S. Ct. of Tex.).*

As set forth in the Statement hereof, clearly the evidence raises the issue of whether or not the defendant railway company failed to furnish Petitioner's deceased husband a reasonably safe place in which to do his work, from which evidence the jury would have been more than justified in making a favorable finding to Petitioner on the reasonably safe place to work issues. Thus, the refusal of the Trial Court to submit to the jury the issue as to the failure of Respondent to furnish the deceased a safe place in which

to do his work and the affirmance by the Court of Civil Appeals and the Texas Supreme Court of the Trial Court's judgment even though the evidence raised such issue clearly constitute invasions of the jury's province. Such invasions certainly are in abrogation of the decisions of this Court, particularly in view of those decisions to the effect that the jury's power to draw inferences is greater under the Federal Employer's Liability Act than a common law. When an injured railway employee has been deprived of his constitutional right of trial by jury, this Court has on many occasions jealously restored this right. *Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; Tennant v. Peoria & PU Ry. Co., 321 U. S. 29; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740; Schulz v. Pennsylvania R. Co., 350 U. S. 253, S. Ct. 608,* to mention but a few.

Therefore, it is respectfully submitted that the Trial Court, the Texas Court of Civil Appeals and the Supreme Court of Texas, in taking away the substantive rights of Petitioner's deceased husband which were granted under the Federal Employer's Liability Act, in refusing to submit to the jury the failure of Respondent to furnish the deceased with a safe place to work, substituted themselves as triers of facts, thereby invading the province of the jury contrary to the rights of Petitioner as granted Petitioner under the Seventh Amendment to the Constitution of the United States.

3. The action of the Trial Court, the Texas Court of Civil Appeals and the Texas Supreme Court in refusing to recognize Petitioner's right to a jury determination of the failure of Respondent to furnish Petitioner's deceased husband with a safe place to work raises an important question of Federal law which has not clearly been, but should be, specifically determined by this Court.

It appears that the Trial Court in its judgment on the jury's verdict and the Court of Civil Appeals in its opinion were following the time honored "proximate cause" theories as they are applicable in the ordinary damage suit without taking into consideration the letter and spirit of the Federal Employer's Liability Act.

The Federal Employer's Liability Act states that every railroad shall be liable in damages for injuries resulting "in whole or in part from the negligence" of the railroad. Thus, the question is presented as to whether or not in cases tried under the Federal Employer's Liability Act the issue of whether or not the employee's injuries were proximately caused by the negligence of the railroad is properly submitted to the jury or whether the test is merely if such negligence "in part" caused such injuries.

Cases by this Honorable Court such as *Griswold v. Gardner, 329 U. S. 725, 67 S. Ct. 74; Cogswell v. Chicago & E&I R. Co., 328 U. S. 820; Coray v. Southern Pacific Company, 335 U. S. 520; Carter v. Atlantic & St. Andrews Bay Ry. Co., 338 U. S. 430;* and *Spokane & M&R R. v. Campbell, 241 U. S. 497,* indicated that the question of proximate cause in the common law sense should not be in a case brought under the Federal Employer's Liabiiity

Act. The Courts of Texas, as well as many of her sister states, apparently base their decisions on whether or not the negligence of the defendant proximately caused the event as a result of which the employee was injured, when, in fact, under the terms of the Federal Employer's Liability Act the inquiry should be whether or not employer negligence "in part" caused such injuries. This indication should certainly be clarified by a specific holding by this Court since it is an important question of Federal law arising in all Federal Employer's Liability Act cases which has not been, but should be, definitely determined by this Court.

4. The questions here presented have great importance and far reaching effect.

There are many, many thousands of employees, who, when they might have the misfortune of being injured in the course and scope of their employment for a railroad company, will of necessity have their claims determined in both State and Federal Courts under the terms and provisions of and decisions rendered under the Federal Employer's Liability Act, and the possible claims of all these individuals will certainly be affected by the decision of the Texas Court of Civil Appeals below with such decision more particularly affecting the rights and claims of those individuals who might have the misfortune of being injured in Texas while in the employment of a railroad.

For this reason alone, it is essential that this Court grant this Writ in order to rectify the inequitable situation created by the decision of the Court of Civil Appeals and in

effect approved by the Supreme Court of Texas, and in this connection it is respectfully submitted that this Court should specifically direct that the ultimate issue in Federal Employer's Liability Act cases is whether or not the employer failed to furnish its injured employee with a safe place in which to do his work.

5. The decision of the Texas Court of Civil Appeals, with effectual approval by the Supreme Court of Texas, affirming the Trial Court's judgment was clearly erroneous.

For the sake of brevity, Petitioner will not set forth the evidence which, in addition to the evidence considered by the jury on issues submitted to it, conclusively showed that Petitioner was entitled to the submission of her requested issues concerning the failure of Respondent to furnish Petitioner's deceased husband with a safe place in which to do his work. However, Petitioner does respectfully again call the Court's attention to the "Material Facts" as herein set forth supra for a recitation of a portion of such evidence. However, in addition to such evidence the State Courts should have also considered the evidence bearing on the issues submitted in determining whether or not issues on the failure of Respondent to furnish Petitioner's deceased husband with a safe place in which to do his work should have been submitted.

For, when taking the evidence which the jury had no opportunity to consider which had bearing on the safety of the place furnished by Respondent to Petitioner's deceased husband, alone, or considering the evidence which had bearing only on the issues submitted to the jury on Re-

spondent's negligence, alone, or in considering both characters of evidence together, there remains no question but that the Trial Court should have submitted to the jury issues concerning the failure of Respondent to furnish Petitioner's deceased husband with a safe place in which to do his work. The situation as here presented falls squarely within the holding of this Court in *Blair v. B&O Ry., 323 U. S. 600, 65 S. Ct. 1528*, wherein it was held, in effect, that where the several elements, taken as a whole, are so closely interwoven as to form a single pattern and where one element imparts character to the other, the jury would clearly have the right to take into consideration the overall situation in determining that the railway company had failed to furnish Petitioner's deceased husband a reasonably safe place in which to perform his work. Without going into detail, a portion of these overall factors concern generally the 84 mile per hour speed at which the train was traveling; the slight time within which the train would be in view of the crossing prior to reaching the crossing; the failure of the railway to have adequate warning and signaling devices at the crossing; the failure of the railway to have a sufficiently audible whistle on the train; the county road work going on around such crossing; the failure to use all the means at hand to stop or impede the progress of the train; the physical and mental condition of the engineer; and the open windows and tied-back doors of the cab in which the deceased was riding. The existence of all of such facts, circumstances and conditions was admittedly known by Respondent or, under the evidence, should have been known by Respondent.

As hereinbefore stated, under the Texas law in determining whether or not an issue should have been submitted, the findings of the jury on other issues shall not be considered. However, as conclusively shown by the above described facts, circumstances and conditions, even the findings of the jury on the special issues, not to mention the evidence as a whole, did not exhaust all the possible grounds on which a finding favorable to Petitioner on her requested issues concerning Respondent's failure to furnish Petitioner's deceased husband with a safe place to work might have been based. *Arnold v. Panhandle & Santa Fe Ry. Co., 353 U. S. 360, 77 S. Ct. 840.*

Without a doubt, this is another prime example where "in Federal Employer's Liability Act cases that an indifferent or unfriendly attitude had permeated with a philosophy hostile to that reflected in the legislation." *(Mr. Justice Douglas, Stare Decisis, 49 Columbia Law Review, 735, 752.)*

In conclusion, for the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court Below

In the

COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH

No. 15998

HELEN MARY ROBINSON, ADMINISTRATRIX,
Appellant,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Appellee

Opinion By Mr. Renfro, A.J.

May 15, 1959

The plaintiff, Helen Mary Robinson, brought suit against the Gulf, Colorado and Santa Fe Railway Company, under the Federal Employers' Liability Act, 45 U. S. C. A., sec. 51 et seq., for damages for the death of her husband while in the scope of his employment with the defendant.

The deceased was killed when the train on which he was working as fireman collided with a County asphalt truck on Avondale School Road in Tarrant County.

Following a verdict and judgment in favor of defendant Railway Company, the plaintiff appealed.

The controlling question is whether the trial court erred in refusing to submit to the jury Requested Issue No. 1(a): "Do you find from a preponderance of the evidence that the defendant on the occasion in question failed to provide Grady Farris Robinson with a safe place to work?", with accompanying issues on negligence and proximate cause.

Plaintiff's petition in paragraph 6 described the train, alleged excessive speed, alleged that by reason of the terrain in the vicinity of Avondale Road, the angle or tangent at which said railroad crosses said road, color of the train, position of the sun, together with shortness of time said train is in view, "works against the timely observation of said train, and particularly against any reasonable judgment of the speed thereof, by a traveler on or near the crossing in question"; that in spite of high speed of trains the Avondale crossing was marked only by an old-fashioned cross-buck railroad crossing sign, that said sign is deceptive as to nature of dangers existing at said crossing. Paragraph 6 concluded as follows: "In connection with the dangers at the crossing here alleged, plaintiff would show that at the time herein complained of, defendant Railway Company had in its employ and regularly operating its fastest train, an elderly man, long past the age of retire-

ment and long past the age in life when the mental and physical faculties of an individual could or should be expected to function as foreseeably necessary and required of one operating such heavy, powerful locomotives at the high and excessive speeds required by defendant company; that such elderly engineer was operating train No. 15 and in full charge and control of the diesel electric multiple-unit controlled locomotive at the time herein complained of, and Grady Farris Robinson, deceased, was by defendant company negligently placed under the control, supervision and direction of said elderly engineer, and made subject to his orders and commands; that immediately before the collision herein complained of, defendant's locomotive, with its elderly engineer, came out of the curve one and one-half miles north of the Avondale School Road crossing at a speed approaching ninety miles per hour, and within sixty or a few more seconds later crashed into a heavy tank truck belonging to the County of Tarrant, as same was moving across defendant's track westward, with the resulting fatal injuries to Grady Farris Robinson, said engineer and the driver of said truck; that under all of the circumstances existing at said time and place, as hereinabove alleged, or a combination of any of said circumstances, defendant Railway Company negligently failed to furnish Grady Farris Robinson with a safe place to work, as required by law to do, and such failure was a proximate cause of his death and the resulting damage herein complained of."

Paragraph 7 alleged the crossing to be extra hazardous.

In paragraph 8 plaintiff plead: "Further and in addition to the above, and in the alternative if necessary, * * *"; then followed thirteen alleged acts of negligence on the part of defendant and its employees.

The jury found: (1) Defendant was not negligent in authorizing its engineers to operate locomotives at the point of collision at a speed of 84 miles per hour. (3) Defendant was not negligent in failing to mark the crossing in some manner to warn the public that trains passed at speeds as high as 84 miles per hour. (5) Defendant's engineer was not negligent in operating the train at a speed of 84 miles per hour. (7) The engineer did not fail to keep a proper lookout. (9) The engineer timely sounded the whistle. (11) He did not fail to timely apply the brakes on the train. (22) As between defendant and deceased the collision was an unavoidable accident. (24 and 25) Failure of the driver of the asphalt truck to keep a proper lookout was sole proximate cause of death of Robinson. (28) The driving of the asphalt truck on the railway track was the sole proximate cause of Robinson's death.

Plaintiff did not object to any of the issues submitted and does not now contend the answers are not supported by the evidence. She does contend that if the "safe place to work" issues had been submitted and answered favorably to plaintiff, such issues would have controlled over the findings exonerating defendant of specific acts of negligence. Had the issues been submitted, she argues, the jury

with its attention directed to all of the factors to be considered, might reasonably have found that defendant failed to provide its employee with a safe place to work, which finding would have precluded a finding that the negligence of the truck driver was the sole proximate cause.

The evidence shows that the truck driver and his helper had just finished lunch. The front end of the truck was facing the railroad at a distance of 47 feet. The helper told the driver to look for trains. Apparently the driver did look for trains. Immediately thereafter the driver started the truck and proceeded at about 2 miles per hour. The rear end of the truck was struck by the engine of defendant's train. The train was traveling at approximately 84 miles per hour. It was estimated the truck was in movement 21 seconds after starting until hit and the train traveled 2767 feet during the same 21 seconds. The truck could have stopped within 12 seconds and avoided the collision. The truck approached the crossing at a slight tangent, but the train came into view one and one-half miles north of the crossing. At the speed the train was traveling it would require 4505 feet for stopping after the brakes were placed in emergency, and the brakes would not take effect at such speed for 738 feet. The crossing in question was marked only by an old-fashioned cross-buck sign reading, "Railroad Crossing." There is no obstruction along the Avondale road approaching the railroad from the east, and no obstruction on the railroad tracks. There is an open view for over a mile where the train is at all times in full view of anyone in the position the truck was in from the

time it started until it reached the tracks. The Avondale road was a little used road. None of the witnesses had ever heard of a prior accident at the crossing in question. The train involved was of the newest and most improved type of railway equipment, including brakes. The fireman and the engineer were killed by burning asphalt from the truck. The defendant had no notice that the County had trucks at work on Avondale road. All the witnesses, called by both plaintiff and defendant, who knew the engineer, testified he was regarded as one of the best of engineers.

The defendant had ICC authority to make the particular section involved a high speed area. To meet the requirement the defendant installed a block train signal system, an automatic train stop control on its locomotive. No change was made affecting the Avondale crossing.

We agree with plaintiff the Federal Courts have broadened the jury's function in F. E. L. A. cases so that very little evidence is required to uphold a jury verdict of negligence. Bailey v. Central Vermont Ry., 319 U. S. 350; Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500; Lavender v. Kurn, 327 U. S. 645; Deen v. Gulf, Colorado & Santa Fe Railway Co., 77 Sup. Ct. Rep. 715.

No doubt had the jury answered the issues submitted favorably to plaintiff this Court, in view of the above and many other cases, would hold that the evidence was sufficient to support findings of negligence.

But the question before us is not the same as if the court had instructed a verdict for the defendant or rendered a judgment notwithstanding the verdict. The question in this

case is whether the trial court adequately presented plaintiff's case to the jury.

In Arnold v. Panhandle & Santa Fe Railway Co., 353 U. S. 360, the United States Supreme Court held that the findings of the jury on special issues (favorable to defendant) did not exhaust all the possible grounds on which the prior finding of unsafe-place-to-work finding of the jury may have been based.

In the instant case our study of the three volumes of statement of facts convinces us the specific issues submitted did include all the grounds on which a finding of unsafe place to work finding could be based.

Like other cases tried in the state courts, F. E. L. A. cases will not be reversed unless the error complained of be of such nature that it "probably did cause the rendition of an improper judgment in the case," as contemplated by Rules 434 and 503, T. R. C. P. Thompson v. Robbins, Sup., 304 S. W. 2d 111.

We do not intend to hold, and do not hold, that it is improper in a F. E. L. A. case to submit a general issue on unsafe place to work and special issues on specific acts or omissions. We merely hold, under the whole record in the case before us, that the trial court did not deprive plaintiff of any substantive rights by refusing to submit the general issue of unsafe place to work, having concluded that the special issues properly and adequately presented all plaintiff's grounds on which there was evidence of unsafe place to work to the jury.

It is also our opinion, in view of the entire record, the trial court did not err in refusing to submit plaintiff's requested issue concerning defendant's failure to protect the train at the crossing by some character of warning device.

Plaintiff's last point complains of the failure of the court to give certain instructions to the jury after the jury, during its deliberations, had requested clarification of issue 3. We fail to see any error.

Judgment affirmed.

Thomas J. Renfro,
Associate Justice.

May 15, 1959

APPENDIX B

Judgments and Orders of the Courts Below

No. 15998

In the
COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH

HELEN MARY ROBINSON, ADMINISTRATRIX,
Appellant,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Appellee.

Opinion By Mr. Renfro, A.J.

May 15, 1959

This cause came on to be heard on the transcript of the record, and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that Helen Mary Robinson, Individually and as Administratrix of the Estate of Grady Farris Robinson, Deceased, and her surety, Maryland Casualty Company, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

No. 17019 15998

In the
COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH

HELEN MARY ROBINSON, ADMINISTRATRIX

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

June 26, 1959

ORDER OVERRULING MOTION FOR REHEARING

This day came on to be heard the motion by appellant for a rehearing in this cause, and said motion having been duly considered by the Court is hereby overruled.

No. A-7460

In the
SUPREME COURT OF TEXAS

HELEN MARY ROBINSON, ADMINISTRATRIX

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

From Tarrant County, Second District

October 7, 1959

ORDER REFUSING APPLICATION FOR WRIT OF ERROR

Application of petitioner for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered by the Court, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Helen Mary Robinson, Individually and as Administratrix of the Estate of Grady Farris Robinson, Deceased, and her surety, Maryland Casualty Company, pay all costs incurred on this application.

No. A-7460

In the
SUPREME COURT OF TEXAS

HELEN MARY ROBINSON, ADMINISTRATRIX

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

From Tarrant County, Second District

November 11, 1959

ORDER OVERRULING MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

Petitioner's motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

FILE COPY

FILED
MAR 10 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 684

HELEN MARY ROBINSON, ADMINISTRATRIX,
Petitioner,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 684

HELEN MARY ROBINSON, ADMINISTRATRIX,
Petitioner,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that the petition for certiorari be dismissed, or in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

The decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas, to which the petition for certiorari is directed, is reported as *Robinson vs. Gulf, Colorado and Santa Fe Ry. Co.*, 325 S.W. 2d 432. That opinion contains a concise summary of the facts as well as the jury findings.

PLAINTIFF'S STATEMENT

In the Petition for Certiorari (page 5-8) plaintiff purports to state the facts. We cannot accept such statement as being more than partially accurate. If it had been labled "Plaintiff's Allegations" we would accept it with the statement that such allegations were not supported by the evidence and were negatived by the jury verdict. We cannot even accept plaintiff's approach that in spite of a clear verdict for the Railroad on all issues of liability, the evidence must be construed most favorable to the plaintiff. Nor can we accept the repeated statement (Petition for Writ of Error, page 4, page 12, page 13, page 15, page 18), that the plaintiff in this case was denied a trial by jury. Plaintiff had a very favorable jury trial and the jury found against her. The Court of Civil Appeals statement of facts and of the jury findings are sufficient, we think, to demonstrate that the plaintiff has not made either a fair or accurate statement of the facts. We, therefore, feel that it is necessary to make a brief summary of the evidence:

STATEMENT OF FACTS

The plaintiff's husband, Grady Robinson, was fireman on the southbound Santa Fe Texas Chief, and both he and engineer J. H. Estes were killed on August 12, 1957, when that passenger train hit a Tarrant County asphalt truck at a wide open country crossing at about 12:45 P.M. The country road involved is called both Avondale School Road and Blue Mound Road. It has very little traffic on it, and there

is not a tree, a bush, a house, a barn or any other character of object along the road or on the railroad right-of-way which in any way interferes with the view of an approaching train. The crossing is so wide open that no one had ever heard of an accident at this crossing before, and there is positive testimony that there had not been one there for at least 25 years. It was a gravel road, and the County had decided to "hot top" it, but had given no notice of its intention to the Santa Fe, nor had any work been done near the track prior to the accident. The asphalt truck was spreading (or shooting) asphalt on the gravel road, and the noise of the machinery kept the truck driver and his helper from hearing the whistle of the train, and because of their attention to their work, they failed to look for the train, which was plainly in view. The collision occurred, and the fireman and the engineer were both killed from the hot asphalt. The driver of the truck was also killed, and the helper was badly burned.

With 20 or more witnesses and a week's trial, the case was submitted to the jury, in accordance with Texas practice, on special issues. Seven different issues on the railway company's negligence were submitted, and the jury answered in each case "no negligence." The jury also found no negligence on the part of the plaintiff's deceased husband. The jury found that the sole cause of the accident was the conduct of the County employees.

The jury, fulfilling its pre-eminent role in FELA cases, found that there was no negligence of the em-

ployer which played any part, however small, in the death which is the subject matter of this suit, and that the sole proximate cause of the accident and the death of Grady Robinson was the conduct of the County employees. Plaintiff conceded in the Texas courts that the jury's findings were supported by the evidence.

The Texas Court of Civil Appeals in effect held that the proofs justified with reason the jury's conclusion that there was no employer negligence which played a part, however small, in producing the death of Grady Robinson.

The Court of Civil Appeals further held that the failure of the Trial Court to submit additional grounds of negligence "did not deprive the plaintiff of any substantive rights" and that there was no error in the case which "probably did cause the rendition of an improper judgment in the case." The plaintiff applied for writ of error to the Texas Supreme Court, which was refused, and her motion for rehearing was overruled. Under the heading, "On the Merits," there is a more detailed statement of the jury findings.

JURISDICTION

Jurisdiction is denied. It is conceded that this is an FELA case and that both the Trial Court and the Court of Civil Appeals recognized it as such. It is recognized that plaintiff's petition was filed in time from a final judgment of a state court. Plaintiff had a jury trial in very favorable atmosphere and got a

jury verdict that her husband's death was solely caused by Tarrant County and that there was no negligence on the part of the railroad. We deny that the affirmance of such a judgment of the Trial Court gives the United States Supreme Court jurisdiction.

Daulton vs. Southern Pac. Co., 352 U.S. 1005, 1 L.Ed. 2d 549, 77 S.Ct. 564;

Burch vs. Reading Co., 353 U.S. 965, 1 L.Ed. 2d 914, 77 S.Ct. 1049;

Brinkley vs. Pennsylvania R. Co., 358 U.S. 865, 3 L.Ed. 2d 97, 79 S.Ct. 94.

Where the plaintiff has had a fair chance to get at the defendant under the Court's charge, failure to submit additional issues or grounds creates no federal question.

Houston Oil Co. vs. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140.

In addition, the plaintiff was not entitled to the particular requested issues under Texas practice, and certainly a Texas court's application of Texas rules of procedure to a Texas state court proceeding creates no federal question.

Black vs. Cutter Laboratories, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824.

Lastly, petitioner predicates jurisdiction solely on 28 U. S. C., Section 1254(3), (see petition for writ of error, page 3). This article (28 U. S. C., Section 1254) applies solely to the Federal Circuit Court of

Appeals. It gives no basis for jurisdiction of a petition for certiorari addressed to a state court.

It is, therefore, respectfully submitted that certiorari should be denied, or in the alternative the petition should be dismissed.

QUESTIONS PRESENTED

1. Jurisdiction as above set out.

2. Whether a clear jury verdict for the defendant is accorded the same finality as a clear jury verdict for the plaintiff in an FELA case.

3. Whether a clear jury verdict for the defendant in an FELA case will be set aside for unsubstantial alleged procedural errors.

4. Whether a State court should reverse the trial court's judgment in an FELA case based on a jury verdict, for claimed errors which, if they existed, were waived under state practice, or for asserted errors which do not constitute reversible error under state practice.

CONSTITUTIONAL QUESTION

In the Petition for Certiorari (page 4), plaintiff makes the bland assertion that the Seventh Amendment to the Constitution of the United States guarantees trial by jury in state courts. Since the plaintiff had a jury trial, and since the jury had twenty-seven different special issues submitted to it which it answered, the question of whether the Seventh Amendment does or does not apply to state court actions is

utterly immaterial. If it were not immaterial, it would raise some very interesting theoretical questions. For example, since the specific language of the Seventh Amendment says it applies only to the federal courts, and the Supreme Court of the United States has uniformly so held, can Congress by enactment of a federal statute (the FELA in this case) amend the Constitution and make it apply to state courts? If the Seventh Amendment applies to this case, then there having been a jury trial in this case, and the jury having returned a clear verdict for the defendant, does the Constitution guarantee that neither the Texas Court of Civil Appeals nor the Supreme Court of the United States will re-examine same other "than according to the rules of the common law"? If the Seventh Amendment is applicable to this case, wouldn't it automatically require the denial of the Petition for Certiorari in view of the jury verdict for the defendant? Since there was a jury trial, all of these questions are immaterial, and since the petitioner has made no attempt to weave the Seventh Amendment into the brief, and only makes a bald assertion, we need make no further statement.

ON THE MERITS

The Court of Civil Appeals opinion contains a statement of the pleadings of the parties and a summary of the evidence. The Santa Fe's brief in the Court of Civil Appeals, pages 2-22, contains a detailed statement of the evidence with references to the record. In view of the factual statement in the Court of Civil Appeals, and in view of the fact that the

plaintiff in the Trial Court has not and does not now question the sufficiency of the evidence to support the jury's findings, we do not believe that a detailed statement of the evidence is essential in this brief.

We do think, however, that this Court, in view of its numerous holdings that the jury is the final arbiter in this type of case, would be interested in the actual jury verdict. The case was submitted to the jury (Tr. p. 64) in the standard Texas procedure of special issues with definitions of ordinary care, negligence, proximate cause, proper lookout and sole proximate cause. The plaintiffs did not object to any of the issues or definitions.

The jury found (beginning Tr. p. 67):

"SPECIAL ISSUE NO. 1.

"Do you find from a preponderance of the evidence that the defendant railway company was negligent in authorizing and directing its engineers to operate locomotives at the point of the collision here involved at rates of speed as high as 84 miles per hour?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 2, being the proximate cause issue, was not answered.

"SPECIAL ISSUE NO. 3.

"Do you find from a preponderance of the evidence that the failure of the defendant to mark said railway crossing in question in some manner so as to warn the public of the fact that trains travelling across the same travelled

up to speeds as high as 84 miles an hour was negligence?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 4 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 5.

"Do you find from a preponderance of the evidence that the defendant's engineer was negligent in operating the locomotive at a rate of speed of 84 miles per hour at the time of the collision here involved?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 6 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 7.

"Do you find from a preponderance of the evidence that the defendant's engineer as he approached the crossing here involved failed to keep a proper lookout, as that term has been defined for you herein, for vehicles using the crossing on the occasion here involved?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 8 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 9.

"Do you find from a preponderance of the evidence that the defendant's engineer upon the

occasion in question failed to timely sound the whistle on the locomotive he was operating as he approached the crossing in question?

"By the term 'timely sound the whistle' as used in this question is meant the sounding of the whistle at such time and distance prior to the time the train went over the crossing here involved as an ordinarily prudent person would have sounded the same under the same or similar circumstances.

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 10 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 11.

"Do you find from a preponderance of the evidence that the defendant's engineer upon the occasion in question failed to timely apply the brakes on the train he was operating as he approached the crossing in question?

"By the term 'timely apply the brakes' as used in this question is meant the applying of the brakes on the train at such time and distance prior to the time the train went over the crossing here involved as an ordinarily prudent person would have applied the same under the same or similar circumstances.

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 12 was a proximate cause issue and was not answered.

Special Issues 13, 14, 15 and 16 related to damages.

Special Issues 17, 18, 19, 20 and 21 related to contributory negligence on the part of Grady Robinson, which were answered in the negative.

"SPECIAL ISSUE NO. 22.

"Do you find from a preponderance of the evidence that the collision in question was not an unavoidable accident (as that term is defined for you below), as far as Grady Robinson and the Santa Fe Railway Company were concerned?

"You are instructed that the term 'unavoidable accident' as used in the above question means an event which occurs without any negligence, if any, on the part of the Santa Fe Railway Company, acting by and through its agents, servants and employees (other than Grady Robinson), and without any negligence on the part of Grady Robinson, which proximately contributed thereto.

"You will answer, 'It was the result of an unavoidable accident,' or 'It was not the result of an unavoidable accident,' as you may find.

"Answer: It was the result of an unavoidable accident."

Special Issue No. 23: This was a reduction of damages, which was not answered, because no negligence was found.

"SPECIAL ISSUE NO. 24.

"Do you find from a preponderance of the evidence that the driver of the county truck on the occasion here in question failed to maintain a proper lookout (as that term is defined for you in this charge) for approaching trains?

"You will answer 'He did fail' or 'He did not

fail,' as you may find.

"Answer: He did fail."

"SPECIAL ISSUE NO. 25.

"If you have answered Special Issue No. 24 above 'He did fail,' and only in that event, then answer this question:

"Do you find from a preponderance of the evidence that such failure, if any you have found, as inquired about in special issue No. 24 above, was the sole proximate cause of the death of Grady Robinson?

"Answer 'yes' or 'no.'

"Answer: Yes."

"SPECIAL ISSUE NO. 26.

"Do you find from a preponderance of the evidence that the driver of the truck failed to properly listen for approaching trains?

"By the term 'properly listen,' as used in the above question is meant the kind of listening that a person of ordinary prudence would have done under the same or similar circumstances.

"Answer 'He did fail' or 'he did not fail.'

"Answer: He did fail."

"SPECIAL ISSUE NO. 27.

"If you have answered special issue No. 26 above 'He did fail,' and only in that event, then answer this question:

"Do you find from a preponderance of the evidence that such failure, if any you have found, as inquired about in special issue No. 26 above, was the sole proximate cause of the death of Grady Robinson?

"Answer 'yes' or 'no.'

"Answer: No."

"SPECIAL ISSUE NO. 28.

"Do you find from a preponderance of the evidence that the driving of the asphalt truck on the track on the occasion in question was not the sole proximate cause of the death of Grady Robinson?

"Answer 'It was the sole proximate cause' or 'It was not the sole proximate cause.'

"Answer: It was the sole proximate cause."

The only special issue which would require any explanation for a non-Texas jurist is Special Issue No. 22, which is called the unavoidable accident issue but actually is, as the definition indicates, the submission of the broad issue of whether there was any negligence (whether specified in the preceding issues or not) on the part of the railroad or the employee which caused the accident. The jury found that there was no negligence on the part of either the railroad or the employee by finding it was an unavoidable accident.

This explanation has been made by the Texas courts frequently. Applicable thereto, we take the following quotation from *Herrera vs. Zinberg* (Civ. App.—Writ refused, N.R.E.) 287 S.W. 2d 695, quoting from page 696:

"The definition of unavoidable accident is broad. It embraces all and every negligence of both plaintiff and defendants and nowhere limits the negligence and proximate cause to those things specially inquired about in the charge. The inquiry about unavoidable accident, as defined, turned the jury completely loose to deter-

> mine from all the evidence and the total situation, whether the plaintiff or the defendants or both or neither did or omitted to do anything amounting to negligence."

The same holding was made in a Jones Act case in which an injured seaman who had the verdict of the jury against him sought reversal on the failure to submit additional issues. We quote from *Guthrie vs. Sinclair Refining Co.* (Civ.App.-Writ refused, N.R.E.) 320 S.W. 2d 396 (certiorari denied November 9, 1959, No. 365) quoting from page 403:

> "Moreover, the jury exonerated both appellant and appellee of all negligence in finding that the occurrence in question was the result of an unavoidable accident. The jury was instructed in connection with the submission of the issue as to whether the accident was or was not an unavoidable accident, that
>
> > 'By the term "unavoidable accident", as used herein, is meant the unforeseen and unanticipated happening of an event occurring without either the Defendant or the Plaintiff being guilty of negligence that proximately caused the accident in question, if any.'
>
> "The finding of the jury negated negligence in all particulars."

Therefore, the plaintiff in this case not only had a submission of every specific ground of negligence that the fertile mind of the plaintiff's lawyer and the trial judge could conceive, but the plaintiff had an opportunity to have the jury make a finding of negligence on the part of the railroad even if unspecified

in the charge or unspecified in the pleadings. The plaintiff had a shotgun issue then, as well as the specific issues.

There is no way to construe the opinions of this Court in the last ten years other than as saying and holding that the jury verdict in FELA cases must be accorded finality. For example, we refer to:

Rogers vs. Missouri Pacific R. Co., 352 U.S. 500, 1 L.Ed. 2d 493, 77 S.Ct. 443;
Coray vs. Southern Pacific Co., 335 U.S. 520, 93 L.Ed. 208, 69 S.Ct. 275;
Tiller vs. Atlantic Coast Line R. Co., 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444;
Lavender vs. Kurn, 327 U.S. 645, 90 L.Ed. 916, 66 S.Ct. 740;
Webb vs. Illinois Central R. Co., 352 U.S. 512, 1 L.Ed. 2d 503, 77 S.Ct. 451;
Wilkerson vs. McCarthy, 336 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413.

From the last case we take the following quotation (quoting 336 U.S. p. 61):

> "But the issue of negligence is for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances."

In this case the Court defines negligence as the failure to do what an ordinarily prudent person would have done under the same or similar circumstances. Therefore, we say the jury verdict for the

defendant in this case is entitled to the same finality as this Court has accorded to verdicts in favor of plaintiffs. This is particularly true since the plaintiff in this case does not attack the sufficiency of the evidence to support the jury's findings.

Plaintiff's application for certiorari is predicated upon alleged error in failing to submit additional grounds of negligence by submitting additional requested special issues.

This Court has further said many times that the finality of a jury verdict in an FELA case should not be disturbed for unsubstantial errors in procedure.

Arnold vs. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 1 L.Ed. 889, 77 S.Ct. 840;
Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 1 L.Ed. 2d 493, 77 S.Ct. 443;
Webb vs. Illinois Central R. Co., 352 U.S. 512; 1 L.Ed. 503, 77 S.Ct. 809.

Certainly, if the jury verdict had been for the plaintiff in this case and the defendant, Santa Fe, had presented the same error, or the same type of error, seeking a reversal and new trial, the Supreme Court of the United States would certainly not even consider a Petition for Certiorari on such grounds seriously, nor if it granted certiorari, would it reverse and remand on such grounds. The Texas Courts, contrary to petitioner's statements, have in many instances applied the same rules and the same standards which were applied in this case to affirm the trial court's judgment to jury verdicts for the plain-

tiff from which the defendant appealed. Even where the Texas Courts have found procedural errors in a plaintiff's jury verdict, reversible error has been denied. See for example the FELA case of:

Thompson vs. Robbins, (Tex.S.Ct.) 304 S.W. 2d 111.

We say, therefore, that grounds for certiorari are not shown in this case. We say that positively and unequivocally without the necessity of the analysis (which is made hereafter) showing the plaintiff's additional issues were encompassed in the issues submitted to the jury, and that under Texas practice even if plaintiff were otherwise entitled to such issues (which she was not), she has failed to show reversible error under such Texas practice. To conclude this portion, we merely paraphrase the holding of the Court of Civil Appeals in this case by saying:

> "The Trial Court did not deprive the plaintiff of any substantive rights, and therefore there was no error which probably caused the rendition of an improper judgment in the case."

NO REVERSIBLE ERROR UNDER TEXAS PRACTICE

Should this Court make a detailed study of the record in this case, it will discover quite promptly that there actually was only one ground of negligence on the part of the railroad in this case. That was the speed of the train. The train was allowed to run 90 miles an hour and was actually running 84 miles an hour at this particular location. The plaintiff had two classes of negligence. One was the negligence of the engineer Estes, all of which claims were submitted to the jury and answered adversely to the plaintiff. Second were the claims of negligence on the part of the railroad company in various respects. This second class of negligence on the part of the railroad company all are predicated on the speed of the train. Besides the particular allegations that the railroad was negligent in permitting the train to run so fast at this location or over this crossing, the other claims are all based on the speed of the train, too. No argument plaintiff makes as to negligence on the part of the railroad (other than the negligence of the engineer) is based on anything other than speed. Merely to briefly illustrate, why does plaintiff say that her husband did not have a safe place to work? Because the train ran so fast. Why does the plaintiff say that this wide open country crossing, which was seldom used and which had never had a prior accident, needed additional warnings? Because the train ran so fast. Why does plaintiff contend that a louder whistle was needed? Because the train ran so fast. Why does the plaintiff contend that more braking

power ought to have been on the train? Because the train ran so fast. This could go through every contention plaintiff makes, and if the same question is asked, you get the same answer.

No matter whether you slice it, cube it, pickle it, or soak it in wine, the heart of plaintiff's contention that Robinson did not have a safe place to work is the speed of the train. Another way to demonstrate that that is the only basis of the contention is to take each argument which plaintiff makes and in the light of the undisputed facts substitute for 84 miles an hour a speed of 20 or 30 miles per hour. If that is done, not even the plaintiff would contend that the result is unsafe place to work.

The Court submitted the speed of the train to the jury twice, and the jury twice found that it was not negligence to operate the train at 84 miles an hour over this particular crossing, under the conditions existing. Stated another way, what is the difference between an issue which reads, "In view of the conditions existing at this particular crossing, including the lack of warning devices, and in view of the kind of brakes, the kind of horn, the kind of engineer, and other factors relating to the train itself, was it negligence to require the operation at speeds up to 84 miles an hour?" and an issue which reads, "In view of the speed of the train permitted and required by the railroad company and the other factors existing, was it negligence on the part of the railroad not to have an additional warning, or additional brakes, or additional whistles?

We realize that this Court does not reach questions such as that above presented, but the plaintiff got so much the better of the Trial Court's rulings and so much the better of the submission to the jury, that human nature being what it is, we cannot fail to resent any contention or implication that the Trial Court dealt with the plaintiff unfairly.

Repeating again, the jury verdict which we have heretofore quoted, was clearly one for the defendant, and was a finding, both specifically and in general, of no negligence on the part of the Railroad Company, and a finding that the sole cause of the death of Robinson was the conduct of the County employees. The question presented is not the same as though the Trial Court had instructed a verdict for the defendant. The question before the Court of Civil Appeals was whether, under the applicable rules of procedure, the claimed errors existed, and if they exist, whether they required the reversal for a new trial. We quote from the Court of Civil Appeals opinion, 325 S.W. 2d 432, at page 435:

> "(2) Like other cases tried in the state courts, F. E. L. A. cases will not be reversed unless the error complained of be of such nature that it "probably did cause the rendition of an improper judgment in the case," as contemplated by Rules 434 and 503, Texas Rules of Civil Procedure. Thompson v. Robbins, Tex., 304 S.W. 2d 111.
>
> (3) We do not intend to hold, and do not hold, that it is improper in a F. E. L. A. case to submit a general issue on unsafe place to work and special issues on specific acts or omissions. We

merely hold, under the whole record in the case before us, that the trial court did not deprive plaintiff of any substantive rights by refusing to submit the general issue of unsafe place to work, having concluded that the special issues properly and adequately presented all plaintiff's grounds on which there was evidence of unsafe place to work to the jury."

Now, getting to the Texas procedural points, we will take them briefly and with only references to one or two of the applicable authorities in the interest of brevity.

First, the plaintiff alleged many grounds of negligence (e.g., competency of the engineer, additional brakes, additional whistles, failure to issue slow orders, etc.). Even if there were evidence to support such issues, the failure of the plaintiff to request the submission of such issues was a waiver thereof, under *Texas Rules of Civil Procedure, Rule* 279 (quoted in full in the appendix hereto). See, for example:

41-B *Tex. Jur.* Secs. 429, 431;

T. & N.O. R. Co. vs. Sturgeon, 142 Tex. 222, 177 S.W. 2d 264;

Johnson vs. Miller, 142 Tex. 228, 177 S.W. 2d 249;

Hicks vs. Harper, 134 Tex. 89, 132 S.W. 2d 579;

McCarver vs. City of Corpus Christi, 155 Tex. 153, 284 S.W. 2d 142.

Next, under the same *Texas Rules of Civil Procedure* (No. 279, quoted in the appendix), it is never

error to fail to submit the same basic issue twice. In other words, no party (plaintiff or defendant) is entitled to have different phases of the same issue submitted.

41-B *Tex. Jur.* Sec. 423, p. 535;

T. & N.O. R. Co. vs. Sturgeon, supra;

Solgaard vs. T. & N.O. R. Co., 149 Tex. 181, 229 S.W. 2d 777;

Smith & Conklin Bros. vs. Griffith, 153 Tex. 341, 268 S.W. 2d 124.

Plaintiff only complains of error by the Trial Court in failing to submit the general issue of unsafe place to work (see petition for certiorari, p. 3 & 4 and p. 11-19).

As we have heretofore pointed out (this brief, p. 14), the submission of Special Issue No. 22, there quoted, was a submission to the jury of the question of whether there was any negligence of any kind on the part of either the railroad company or Robinson. The jury answered no. Had the jury been of the opinion that there was any negligence on the part of the railroad, whether included in the special issues submitted or not, they would have answered the foregoing issue to the effect that there was negligence. They did not need to specify; they did not need to limit it to safe place to work, additional warnings, or incompetent engineer. They would have just found that there was negligence; but they did not. Therefore, the plaintiff had a submission of safe place to work (and every other ground of negligence sup-

ported by either the pleadings or the evidence) on the part of the railroad company, and the jury answered no. (See *Guthrie vs. Sinclair Refining Co.*, supra, in which this very point was decided in a Jones Act case, and in which certiorari was denied by this Court on November 9, 1959.)

Next, plaintiff cannot claim reversible error, under *Rule* 279, unless the requested issue is in substantially correct form. See:

41-B *Tex. Jur.*, Sec. 425, p. 543;

Harris vs. Lestie, 128 Tex. 81, 96 S.W. 2d 276;

Edmondson vs. Carroll, (Ft. Worth Court—Dism., Judgm. Cor.) 134 S.W. 2d 378;

Anderson vs. Broome (No writ history), 233 S.W. 2d 901;

Texas Gen. Ins. vs. McNeill (No writ history) 261 S.W. 2d 378;

Mitchell vs. Mills (Wr. N.R.E.), 264 S.W. 2d 749;

Cruse vs. Daniels (Wr. N.R.E.), 293 S.W. 2d 616;

Sunset Motor Lines vs. Blasingame (Wr. dism.), 245 S.W. 2d 288.

This rule precludes any error on plaintiff's requested shotgun issue of safe place to work, because under Texas practice the issues should be confined to the specific acts or omissions of negligence alleged.

Northeast Texas Motor Lines vs. Hodges, 138 Tex. 280, 158 S.W. 2d 487;

Triangle Cab Co. vs. Taylor, 144 Tex. 568, 192 S.W. 2d 143;

Sproles vs. Rosen, 126 Tex. 51, 84 S.W. 2d 1001;

Thompson vs. Robbins, 157 Tex. 463, 304 S.W. 2d 111;

Texas Employers' Ins. Co. vs. Frankum, 148 Tex. 95, 220 S.W. 2d 449.

Relating specifically to "safe place to work," we refer the Court to 41-B *Tex. Jur.* Sec. 452 p. 583:

> "The court should not submit in a single issue the defendant's negligence generally in failing to furnish a safe place to work, but should submit separately the issue as to the existence or non-existence of each of the various defects in the premises which it is claimed made the premises unsafe."

See also:

Ginther vs. Southwest Workover Co., (Civ. App.—no writ hist.) 286 S.W. 2d 291, p. 293;

Gulf States vs. Dillon, (Civ.App.—no writ hist.) 112 S.W. 2d 752, p. 754;

McDonald vs. Joske's (Civ.App. — no writ hist.) 268 S.W. 2d 475.

Therefore, under Texas practice plaintiff in this case, if there were error, has failed to preserve it, has waived it, and under Texas practice she is not entitled to reversal for these procedural matters.

Lastly, while it is totally unnecessary in reply to a petition for certiorari, we do not want any brief filed which would even impliedly admit that there was any evidence to support the submission of the additional grounds of negligence. The Court submitted many issues of negligence which were not supported by the evidence, and certainly plaintiff got more issues than she was entitled to. The plain facts of this case are that two good men, Engineer Estes and Fireman Robinson, were killed because of the County employees' gross negligence. They violated Article 6701d of the *Revised Civil Statutes*, and they violated every rule of common prudence. The County furnished no one to flag or help or warn them, and they made no effort to prevent the accident. Under the opinion of the majority in *Inman vs. Baltimore & Ohio R. Co.*, No. 36 decided December 14, 1959, appearing in 4 L.Ed. 2d 198 advance sheet, the Trial Court in this cause should have instructed a verdict for the defendant because Robinson was killed plainly and obviously by the acts of the County employees, not only the truck driver but the supervisor employees who failed to warn the railroad and failed to station anyone there to help them. The Trial Court, however, submitted this case to the jury just as the minority in *Inman* wanted it done, and the jury found that the sole cause of Robinson's death was the conduct of these County employees. The jury verdict in this case is the same as in *McDonald vs. Pennsylvania R. Co.* (3rd Cir.) 210 F.2d 524, and certainly in light of the jury verdict we should be justified in saying, as the Third Circuit did in that case, that Robinson was killed not

by the railroad but by the senseless indifference of the County employees.

SUMMARY

The respondent, Gulf, Colorado and Santa Fe Railway Company, says that a clean jury verdict in favor of the railroad company in an FELA case creates no federal question. The jury was right, the Trial Court was right, and the Texas Court of Civil Appeals was right, for many reasons not included in this reply. Summarizing the reasons here presented for a denial of certiorari:

(a) Jurisdiction is denied, because a jury verdict for the defendant in an FELA case creates no federal question, and neither the Trial Court nor the Court of Civil Appeals deprived the plaintiff of any substantive federal right. Where the plaintiff had seven opportunities to obtain a finding of negligence on the part of the railroad, and the jury answered each of such questions in the negative, failure to submit additional grounds presents no federal question.

(b) Jury verdicts in FELA cases, whether for the plaintiff or for the defendant, are not to be set aside by appellate courts on unsubstantial procedural points.

(c) On the merits, the plaintiff got everything she was entitled to, and more. She had submitted to the jury six particular grounds of negligence on the part of the defendant, and the jury answered all of them no. She had a shotgun issue of whether there

was any negligence on the part of the defendant causing the accident, and the jury answered that no. The evidence did not raise any ground of negligence other than the specific ones submitted, but if it did, she got her general submission, too.

(d) Plaintiff, having elected to file this suit in the State court, was bound by those rules of State practice which apply equally to all litigants. If there were any error (which there was not) in failing to submit additional issues, plaintiff has failed to preserve reversible error under Texas applicable rules of practice.

CONCLUSION

Plaintiff's husband was killed in a horrible accident while a fireman on the defendant's passenger train. After a more than fair jury trial, judgment was rendered against the plaintiff and in favor of the Santa Fe Railway, because the jury found that there was no negligence whatsoever on the part of the railway company and that the sole cause of the death of plaintiff's husband was the conduct of the County employees. We respectfully submit that such as case is not one for certiorari jurisdiction. We further submit that this Court, on a review of the record, would reach the same conclusion that the jury did, the Trial Court did, and that the Texas Court of Civil Appeals did.

WHEREFORE, premises considered, the respondent prays that certiorari be denied or dismissed.

Respectfully submitted,

Luther Hudson
c/o HUDSON, KELTNER, JORDAN & CUNNINGHAM
1313 Continental Life Building
Fort Worth 2, Texas

I certify that a copy of the foregoing respondent's reply to petition for writ of certiorari has been mailed on the 24 day of March, 1960, to petitioner's attorneys, as follows: to Akin & Vial, 1405 Mercantile Securities Building, Dallas 1, Texas; and to Cantey, Hanger, Johnson, Scarborough & Gooch, 1500 Sinclair Building, Fort Worth 2, Texas.

Of Counsel for Respondent

APPENDIX

Vernon's Annotated Texas Rules of Civil Procedure, Rule 279:

"Rule 279. Submission of Issues

"When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in treaspass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been

requested in writing and tendered by the party complaining of the judgment.

"Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party."